PUBLIC FINANCE BHD.

v.

NATCOM DEVELOPMENT SDN. BHD. & ORS.

FEDERAL COURT, KUALA LUMPUR
TAN SRI DATO' ANUAR DATO' ZAINAL ABIDIN CJ (MALAYA)
TAN SRI DATO' MOHD. AZMI DATO' KAMARUDDIN FCJ
TUAN SRI RAMACHANDRAN RAMASAMY GOPAL IYER JCA
[CIVIL APPEAL NO: 02-296-94]
23 APRIL 1996

CIVIL PROCEDURE: *Striking out - Want of prosecution - Intentional and contumelious delay - Appellant granted extension of time to prosecute action - Further delay by appellant in setting down action for trial - Whether extension of time rendered preceding delay academic - Whether Counsel for appellant gave undertaking - Whether trial Judge right in finding appellant's conduct contumelious.*

CIVIL PROCEDURE: *Time - Extension of time - Notice issued by Court under O. 34 r. 8(2) of Rules of the High Court 1980 - Appellant granted time extension to prosecute action - Appellant delayed further in setting down action for trial - Whether extension of time rendered preceding delay academic - Whether Counsel for appellant gave undertaking.*

CIVIL PROCEDURE: *Striking out - Principles - Defiance of peremptory order on procedure - General disinterestedness in prosecuting claim - Rules of the High Court 1980, O. 34 r. 8(2).*

This was an appeal by the plaintiff ('the appellant') against the High Court's dismissal of its suit for want of prosecution. On 24 October 1990, the appellant issued a writ against the defendants ('the respondents') for the recovery of a loan which had been taken by the 1st respondent and guaranteed by the 2nd, 3rd, 4th, and 5th respondents. On 15 March 1992, the appellant took out a summons for directions under O. 25 of the Rules of the High Court ('the RHC'), and on 24 June 1992, obtained an order for directions which, *inter alia*, directed the parties to exchange their lists of documents within 30 days therefrom. The said order made no provision for setting down the action for trial. As it turned out, the lists of documents were not exchanged, nor was the action set down for trial.

On 26 January 1994, the High Court issued a notice under O. 34 r. 8(2) of the RHC requiring the attendance of the parties on 13 February 1994. On that day, Counsel for the appellant was present but the respondents and their Counsel were not. Counsel for the appellant then requested for one month to prosecute the action. The said request was granted and the action was then adjourned to 19 March 1994. The Judicial Commissioner ('the JC'), however, made no peremptory order requiring the appellant to act within that one month.

As it turned out, the action was not called on for disposal on 19 March 1994 but came up in chambers on 21 April 1994. (It transpired that Counsel for the appellant had filed the relevant papers for setting down the action for trial as well as the bundle of documents on 14 April 1994.) After hearing the arguments, the JC dismissed the appellant's suit and refused the appellant's application for further arguments in open Court; he had found the appellant guilty of intentional and contumelious delay. The appellant appealed.

Held:

Per Gopal Sri Ram JCA (delivering the judgment of the Court):

[1] It was perfectly open to the JC to reject the explanation proffered by Counsel for the appellant and to dismiss the suit when it first came up before him on 13 February 1994 pursuant to the show cause notice. However, he chose not to do so, but, instead, gave the appellant more time to enter the action for trial. In the result, the JC's decision to grant the appellant more time had rendered the preceding delay academic. His reference to, and reliance upon, that delay was clearly wrong and had amounted to a misdirection.

[2] The JC could have misunderstood the appellant counsel's request for the one month extension as an undertaking that the action would be set down for trial within that one month. There was absolutely nothing in the JC's note to suggest that Counsel for the appellant had given such an undertaking.

[2b] As there was no such undertaking given by Counsel for the appellant, the JC was plainly wrong in punishing the appellant for exceeding that 'imaginary' one month. In the result, the JC had proceeded to find the appellant guilty of contumelious conduct in reliance upon a non-existent basis.

[2c] The JC appeared to have given little or no weight to the fact that Counsel for the appellant had filed the relevant papers to set down the action for trial. Once the action had been entered for trial, it would have been far better for the JC to fix a date for hearing and to dispose of the suit on its merits.

Obiter dicta:

[1] A plaintiff is liable to have his action struck out if he fails to obey a peremptory order on the procedural conduct of his case, or if displays such a general disinterestedness in the conduct of the litigation as to invite the inference that he has no desire in prosecuting his claim. Judges and Judicial Commissioners of the High Court must hearken to the spirit and intendment of O. 34 r. 8 of the RHC and only strike out those cases falling clearly

within the above principle. An over zealous application of the rule may prove counter-productive.

[2] Order 34 r. 8 of the RHC is a wholesome provision which provides an effective machinery for the disposal of cases long languishing in the Courts. When properly used, it has the beneficial effect of clearing the Courts of unnecessary backlog. When used without due care and caution, it will perpetuate the very delay which it is intended to cure. In the instant case, if the JC had tried the action rather than summarily dismissing it, the action would have been disposed of in a few months. Any appeal to the Court of Appeal would likewise have been heard and determined not long thereafter. And a further appeal, if any, to the instant Court would also have been dealt with.

[3] Those who invoke the process of the Court must be prepared to act timeously in having their grievances heard. The Courts are no longer prepared to tolerate the long delays with which the law has been associated. Trial Courts are now anxious to clear the business assigned to them, and those concerned in the administration of civil justice should ensure that the Courts are not unnecessarily burdened with litigation that is not intended to be prosecuted in earnest.

[Appeal allowed; order of High Court dismissing suit set aside; and suit restored to file]

[Appeal from High Court Malaya, Alor Setar; [1994] 3 CLJ 828]

***[Bahasa Malaysia** Translation of Headnotes]*

***PROSEDUR SIVIL:** Pembatalan - Ketiadaan pendakwaan - Kelewatan yang disengajakan dan melampau - Perayu diberikan lanjutan masa untuk mendakwa tindakan - Kelewatan seterusnya oleh perayu dalam menetapkan tindakan untuk perbicaraan - Samada lanjutan masa menjadikan kelewatan akedamik - Samada Peguam bagi pihak perayu telah memberikan akujanji - Samada Hakim perbicaraan betul dalam memutuskan bahawa kelakuan perayu melampau.*

***PROSEDUR SIVIL:** Masa - Lanjutan masa - Notis dikeluarkan oleh Mahkamah di bawah A. 34 k. 8(2) Kaedah-kaedah Mahkamah Tinggi 1980 - Perayu diberikan lanjutan masa untuk mendakwa tindakan - Perayu melengahkan seterusnya dalam menetapkan tindakan untuk perbicaraan - Samada lanjutan masa menjadikan kelewatan akademik - Samada Peguam bagi pihak perayu memberikan akujanji.*

***PROSEDUR SIVIL:** Pembatalan - Prinsip-prinsip - Penentangan perintah muktamad prosedur - Sifat ketidakpedulian dalam mendakwa tuntutan - Kaedah-kaedah Mahkamah Tinggi 1980, A. 34 k. 8(2).*

Ini adalah suatu rayuan oleh plaintif ('perayu tersebut') terhadap penolakan Mahkamah Tinggi akan guamannya kerana ketiadaan pendakwaan. Pada 24 Oktober 1990, perayu tersebut telah mengeluarkan writ terhadap defendan ('responden tersebut') untuk mendapatkan semula pinjaman yang telah diambil oleh responden pertama dan digerentikan oleh responden-responden ke2, ke3, ke4 dan ke5. Pada 15 Mac 1992, perayu tersebut telah mengeluarkan saman arahan di bawah A. 25 Kaedah-kaedah Mahkamah Tinggi ('KMT tersebut') dan pada 24 Jun 1992, telah mendapatkan perintah untuk arahan yang mana, antara lainnya, mengarahkan pihak-pihak tersebut supaya menukar-ganti senarai dokumen-dokumen mereka dalam tempoh 30 hari daripada tarikh itu. Perintah tersebut tidak membuat peruntukan bagi menetapkan tindakan tersebut untuk perbicaraan. Sepertimana keadaannya, senarai dokumen tersebut telah tidak ditukar, begitu juga tindakan tersebut telah juga tidak ditetapkan untuk perbicaraan.

Pada 26 Januari 1994, Mahkamah Tinggi telah mengeluarkan notis di bawah A. 34 k. 8(2) KMT tersebut, menghendaki kehadiran pihak-pihak tersebut pada 13 Februari 1994. Pada hari itu, Peguam bagi pihak perayu telah hadir tetapi responden-responden dan Peguam mereka tidak. Peguam bagi pihak perayu kemudiannya meminta tempoh selama satu (1) bulan untuk mendakwa tindakan itu. Permintaan ini telah diberikan dan tindakan telah kemudiannya ditangguhkan kepada 19 Mac 1994. Pesuruhjaya Kehakiman ('PK tersebut'), namun begitu, tidak membuat perintah muktamad yang menghendaki perayu bertindak dalam tempoh satu bulan itu.

Sebagimana keadaannya, tindakan itu tidak dipanggil untuk penyelesaian pada 19 Mac 1994 tetapi tiba dalam kamar pada 24 April 1994. (Didapati bahawa peguam bagi pihak perayu tidak memfailkan kertas-kertas guaman yang relevan untuk menetapkan tindakan tersebut untuk perbicaraan pada 14 April 1994). Selepas mendengar hujahan, PK tersebut telah menolak guaman perayu dan enggan menerima permohonan perayu untuk hujahan-hujahan seterusnya dalam Mahkamah terbuka; beliau mendapati perayu bersalah atas kelewatan yang disengajakan dan yang melampau. Perayu tersebut telah merayu.

Diputuskan:

Oleh Gopal Sri Ram HMR (menyampaikan penghakiman Mahkamah):

[1] Adalah terbuka kepada PK tersebut untuk menolak penjelasan yang diberikan oleh Peguam bagi pihak perayu dan menolak guaman itu ketika ianya tiba pertama kalinya di hadapan beliau pada 13 Februari 1994 selaras dengan notis menunjukkan sebab. Walaubagaimanapun, beliau telah memilih untuk tidak melakukan sedemikian, tetapi, sebaliknya telah memberikan perayu tersebut masa yang lebih untuk memasukkan tindakan tersebut untuk perbicaraan. Akibatnya, keputusan PK untuk memberikan perayu lebih masa telah menjadikan kelewatan akademik. Rujukan beliau kepada, dan penggantungan atas, kelewatan itu jelasnya salah dan telah membawa kepada satu salah arahan.

[2] PK tersebut mungkin telah tersalah-faham akan permintaan peguam Perayu untuk lanjutan selama satu bulan sebagai satu akujanji bahawa tindakan tersebut akan ditetapkan untuk perbicaraan dalam tempoh satu bulan itu. Tidak terdapat apa-apa pun secara mutlak dalam nota PK tersebut bagi menyarankan bahawa peguam bagi pihak Perayu telah memberikan akujanji yang sedemikian.

[2b] Oleh kerana tidak terdapat akujanji yang sedemikian diberikan oleh peguam bagi pihak perayu, PK tersebut adalah jelasnya salah dalam menghukum perayu tersebut kerana telah melampaui tempoh "rekaan" satu bulan itu. Akibatnya, PK tersebut telah mendapati perayu bersalah atas kelakuan yang melampau bergantung ke atas dasar yang tidak wujud.

[2c] PK tersebut telah tidak menghiraukan sama sekali fakta bahawa Peguam bagi pihak perayu telah memfailkan kertas-kertas yang relevan untuk menetapkan tindakan tersebut untuk perbicaraan. Sebaik sahaja tindakan tersebut telah dimasukkan untuk perbicaraan, ianya adalah sebaiknya bagi PK tersebut menetapkan satu tarikh untuk perbicaraan dan menyelesaikan guaman tersebut berdasarkan guamannya.

Obiter dicta:

[1] Seorang plaintif bertanggungan menyebabkan tindakannya dibatalkan jika beliau gagal mematuhi perintah muktamad mengenai sifat prosedur kesnya, atau jika beliau menunjukkan sifat ketidakpedulian am yang sedemikian dalam melakukan litigasi sehingga memberikan inferens bahawa beliau tidak ingin untuk mendakwa tuntutannya. Hakim-hakim dan Pesuruhjaya-pesuruhjaya Kehakiman Mahkamah Tinggi haruslah menanggung bersama akan sikap dan maksud A. 34 k. 8 KMT dan hanya membatalkan kes yang jelas di dalam lingkungan prinsip-prinsip yang tersebut di atas. Suatu permohonan yang amat bersemangat terhadap kaedah tersebut menjadi produktif-bersaling.

[2] Aturan 34 k. 8 KMT adalah peruntukan yang menyeluruh yang mana memperuntukkan suatu jentera yang berkesan untuk pelupusan kes-kes yang telah lama berlarutan di Mahkamah. Bilamana digunakan dengan betul, ianya mempunyai kesan beneficial dalam menyelesaikan kelewatan yang tidak diperlukan. Bilamana digunakan tanpa pengamatan dan perhatian ianya akan mengekalkan kelewatan yang ianya diniatkan untuk perbaiki. Dalam kes semasa ini, jika PK telah membicarakan tindakan tersebut dan bukannya menolaknya secara terus, tindakan tersebut tentunya telah dilupuskan dalam beberapa bulan. Apa-apa rayuan kepada Mahkamah Rayuan akan begitu juga didengar dan ditentukan tidak lama selepas itu. Dan satu rayuan yang selanjutnya, jika ada, kepada Mahkamah semasa ini akan juga diuruskan.

[3] Mereka yang memohon proses Mahkamah haruslah bersedia untuk bertindak pada waktunya dalam menentukan agar kilanan mereka didengar. Mahkamah tidak lagi akan bersabar dengan kelewatan-kelewatan melampau yang telah sering dikaitkan dengan undang-undang. Mahkamah perbicaraan kini ingin menyelesaikan masaalah yang diserahhak kepadanya, dan mereka yang mempunyai kaitan dengan pentadbiran keadilan sivil haruslah memastikan bahawa Mahkamah tidak dibebankan dengan litigasi yang sesungguhnya tidak diniatkan untuk didakwa.

[Rayuan dibenarkan; perintah Mahkamah Tinggi yang menolak guaman diketepikan; dan guaman dikembalikan semula kepada fail]

Case referred to:
Toh Hock Thye & Ors. v. Toh Chwee Biow [1982] 1 MLJ 152 ***(cit)***

Legislation referred to:
Rules of the High Court 1980, O. 25, O. 34 r. 8

For the appellant - Low Kim Leng; M/s. Soo Thien Ming & Nashrah
For the respondents - Tony Dhana; M/s. Zaitoon Othman & Assoc

JUDGMENT

Gopal Sri Ram JCA

This is an appeal against the order of the learned Judicial Commissioner at Alor Setar, dismissing the appellant's suit for want of prosecution. We heard and allowed this appeal on 22 April 1996. The reasons for our decision now follow.

The facts relevant to this appeal may be briefly stated. For convenience, we will refer to the parties as plaintiff and defendants.

On 24 October 1990, the plaintiff bank caused to be issued a writ against the defendants, claiming a sum of RM263,917.96 which had been borrowed by the first defendant and guaranteed by the other defendants. The second, fourth and fifth defendants having delivered their respective defences, the plaintiff, on 15 March 1992 took out a summons under O. 25 of the Rules of the High Court 1980, and, on 24 June 1992, obtained an order for directions. That order, *inter alia*, directed the parties to exchange their respective lists of documents within 30 days from its date. Surprisingly, however, the order made no provision for the setting down of the action for trial.

Nothing further was done by the plaintiff to carry out the terms of the order. The lists of documents were not exchanged. Nor was the action set down for trial. In short, as is so often the case in civil litigation, the parties treated the order for directions with little or no respect. In consequence, the suit lay idle in the registry of the High Court for several years. The Court then moved *suo motu* to deal with the matter.

On 26 January 1994, the High Court issued a notice under O. 34, r. 8(2) requiring the parties to attend before the Judicial Commissioner on 13 February 1994. When the suit was called on for disposal on that date, the plaintiff was present by its Counsel. The defendants and their Counsel were, however, absent. Counsel for the plaintiff explained that the matter had been overlooked and asked for a month to take the necessary steps to prosecute the action. The note recorded by the learned Judicial Commissioner shows that he then adjourned the matter to 19 March 1994. There was no peremptory order made requiring the plaintiff to act within a month. Neither does the note reflect any undertaking on the part of Counsel that the matter would be set down for trial within a month.

For some reason (not readily apparent) the suit was not called on for disposal on 19 March 1994. However, it did come up in Chambers on 21 April 1994. On this occasion, Counsel for both the plaintiff and the second, fourth and fifth defendants were present. It transpired that the plaintiff's solicitors had filed the relevant papers for setting down the action for trial as well as the bundle of documents only on 14 April 1994. The learned Judicial Commissioner, after hearing arguments of Counsel, proceeded to dismiss the suit. He also refused an oral application for further argument in open Court, made by Counsel for the plaintiff pursuant to the rule of Court then in existence.

When he came to write his reasons for his decision, this is what the learned Judge said:

> The plaintiff did not file any affidavit in reply to the show cause notice. On the day of the hearing of the show cause (13 February 1994), the learned Counsel for the plaintiff, Cik Sofiah bt. Ariffin, informed the Court that the delay was unintentional: there was some confusion regarding the files maintained by her firm in respect of this suit. Although no affidavit had been filed by the plaintiff in response to the show cause notice, and the explanation given, to my mind, was lacking in merit, nevertheless, on compassionate ground, I did not forthwith dismiss the action. Instead, I allowed the plaintiff to proceed subject to an undertaking by plaintiff's Counsel that she would set the action down for trial within a month's time. In order to ensure that the undertaking was complied with, I also ordered that the case be brought up again before me for mention on 19 March 1994. For some reason, however, the mention date was postponed to 21 April 1994.
>
> However, on 21 April 1994 I was disappointed to note that learned Counsel had not complied with the undertaking to set down the matter for trial within a month's time. The notice to set down the action for trial, the bundle of documents and the bundle of pleadings were filed by the plaintiff only on 14 April 1994. In other words, there was a delay of about a month. Again, no affidavit was filed to explain the delay. Learned Counsel for the plaintiff, speaking from the Bar, put the blame for the delay on the defendants' solicitor. She said that the defendants' solicitor did not respond to the plaintiff's solicitor's letter regarding the documents to be agreed upon. To my mind, there was no proper and sufficient

> explanation given by plaintiff's Counsel for the failure to comply with the undertaking. Indeed, with respect, I must remark here that I had been generous, earlier on, in allowing the plaintiff to proceed, but unfortunately my generosity had been abused.

The learned Judicial Commissioner then referred to the decision in *Toh Hock Thye & Ors. v. Toh Chwee Biow* [1982] 1 MLJ 152, and, having reproduced the relevant passages from the judgment of Salleh Abas FJ (later Lord President) in that case, concluded as follows:

> On the facts of the present case, it was clear that there had been a very long delay. Taking the time from the date of the order pursuant to the summons for directions until the date of the notice to show cause issued by the Court, there had been a lapse of about one year and eight months. However, taking the time from the date of the filing of the writ until the date of the notice to show cause, there had been a lapse of slightly more than three years! In my view, judging from the conduct of the plaintiff, the delay was an intentional and contumelious action disrespectful to the Court.

With respect to the learned Judicial Commissioner, we found ourselves in disagreement with the views he had expressed.

First, there is absolutely no question of there having been a long delay on the part of the plaintiff in prosecuting the action. Those who invoke the process of the Court must be prepared to act timeously in having their grievances heard. The Courts are no longer prepared to tolerate the long delays with which the law has been associated. These days, trial Courts are anxious to clear the business assigned to them. All others who are concerned in the administration of civil justice should ensure that the Courts are not unnecessarily burdened with litigation which is not intended to be prosecuted in earnest.

That said, in the present case, it was perfectly open to the learned Judicial Commissioner to have rejected the explanation proffered by the legal advisers of the plaintiff and to have dismissed the suit when it first came up before him, pursuant to the show cause notice, on 13 February 1994. But he chose not do so. Instead, he gave the plaintiff further time to enter the action for trial. That he did so on compassionate grounds is wholly irrelevant. The fact remains that his decision to grant the plaintiff further time rendered the preceding delay academic. His reference to, and reliance upon, that delay was clearly wrong and amounts to a misdirection on his part.

Second, the learned Judicial Commissioner approached the case on the footing that Counsel for the plaintiff had given an undertaking which she had breached. As we have earlier observed, the note recorded by the learned Judicial Commissioner discloses no such undertaking as suggested by him in his judgment. In fairness to him, he may well have misunderstood Counsel's request for a month's extension to get her client's case in order to amount to an assurance. But an undertaking by Counsel is quite a different thing

altogether. It is a serious matter, the breach of which may amount to misconduct on the part of the giver of the undertaking.

Having had the relevant note read and re-read to us, we are entirely satisfied that there was nothing to even remotely suggest that Counsel had given her solemn undertaking in the terms referred to by the Judicial Commissioner in his judgment. Further, the order he made on 13 February 1994, merely adjourned the case to 19 March, without any further minute referring to an undertaking.

Third, the learned Judicial Commissioner appears to have given little or no weight to the fact that the relevant papers to set the action down for trial had been filed, albeit beyond the one month requested for by Counsel. That there was no undertaking given puts paid to the learned Judicial Commissioner's view that the month was exceeded. Once the action had been duly entered for trial, it would have been far better for the Judicial Commissioner to have fixed a date for hearing and disposed of the suit on its merits. The fact that the month requested for had been exceeded takes one nowhere. The learned Judicial Commissioner was therefore plainly wrong in punishing the plaintiff for exceeding the month in question.

It follows from what we have said thus far that the Judicial Commissioner had proceeded to find the plaintiff guilty of contumelious conduct upon a non-existent basis. His decision therefore becomes unsustainable.

The law in regard to the timeous prosecution of suits has been stated in many cases decided by the precursors of this Court and nothing may be usefully added to the learning contained in them. The effect of those decisions may be summarised thus. Generally speaking, a plaintiff is liable to have his action struck out if he has failed to obey a peremptory order made touching upon the procedural conduct of his case or where he has displayed such a general disinterestedness in the conduct of the litigation as to invite the inference that he has no desire in prosecuting his claim.

Order 34 r. 8 is a wholesome provision which provides an effective machinery for the disposal of cases long languishing in our Courts. When properly used it has the beneficial effect of clearing the Courts of the unnecessary backlog with which they are burdened. When used without due care and caution, it will perpetuate the very delay which it is intended to cure.

Take this very case. Had the learned Judicial Commissioner decided to try the action rather than summarily dismissing it as he did, the case would have been finally disposed of in a few months. Any appeal to the Court of Appeal would likewise have been heard and determined not long thereafter. A further appeal, if any, to this Court would also have been dealt with.

As it happens, the action, after a delay of some two years, has now to be remitted to the learned Judicial Commissioner for trial. Had the action not been summarily dismissed, all the trial and appellate procedures, of which we spoke of a moment ago, available to an unsuccessful litigant may well have been exhausted during this period of delay.

Judges or Judicial Commissioners of the High Court must hearken to the spirit and intendment of O. 34 r. 8 and only strike out those cases falling clearly within the principle we have enunciated earlier in this judgment. An over zealous application of the rule may prove counter-productive.

Having satisfied ourselves that the learned Judicial Commissioner had misdirected himself, we had no alternative but to allow the appeal. The order of the learned Judicial Commissioner was set aside and the suit was restored to file. The respondent was ordered to pay the costs of the appeal to the appellant. The security deposit lodged by the appellant in Court was ordered to be refunded to it.

Reported by Gan Peng Chiang